

APPEAL NO. 030957
FILED JUNE 6, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 3, 2003. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) request for spinal surgery is not medically necessary and is disapproved. The claimant appeals, arguing that the hearing officer erred by determining that the decision and order of the Independent Review Organization (IRO) is supported by a preponderance of the evidence. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

At the outset, we address the claimant's request for us to take official notice of documents that may be in our file but not introduced as evidence at the CCH. Documents not submitted at the CCH are generally not considered unless they constitute newly discovered evidence. See *generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Upon our review, the evidence that the claimant asks us to take official notice of is not so material that it would probably produce a different result, nor is it shown that the documents could not have been provided as evidence at the hearing below. The evidence, therefore, does not meet the requirements for newly discovered evidence and will not be considered on appeal.

The hearing officer did not err in concluding that the IRO's decision and order is supported by a preponderance of the evidence. The claimant sustained a compensable injury to his low back on _____, and his doctor recommended lumbar surgery in order to alleviate some of the claimant's pain. The carrier disputed the doctor's recommendation, and the Texas Workers' Compensation Commission (Commission) assigned this case to an IRO. The IRO resolved that the claimant had no need for lumbar surgery. The hearing officer did not err in determining that the IRO's report was supported by a preponderance of the evidence.

The claimant contends that there is a fatal conflict between the 1989 Act (Section 413.031) and the Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(v) (Rule 133.308(v)). The claimant asserts that it is error to afford an IRO decision presumptive weight¹ as set out in Rule 133.308(v) because Section 413.031 never mentions such

¹ We have previously addressed the "presumptive weight" provision of Rule 133.308(v) and determined that it is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption, that the IRO decision is the correct decision which should be adopted by the hearing officer and the Appeals Panel unless rebutted by contrary evidence. See Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002.

language. The issue of an alleged conflict between the 1989 Act and the rules of the Commission is a matter beyond the scope of the Commission's Appeals Panel and would need to be resolved by the Courts. See Texas Workers' Compensation Commission Appeal No. 022057, decided September 24, 2002.

The claimant also argues that the IRO process, "constitutes an invalid delegation of governmental authority to a private entity and is therefore invalid and void." Rule 133.308(o)(5) provides that an IRO decision is deemed to be a decision and order of the Commission. Once again, the validity of a Commission rule is beyond the scope of the Appeals Panel.

Although the claimant asserts several theories urging reversal of the hearing officer's determination, we find those arguments without merit. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Based upon our review of the record, we find no error in the hearing officer's determination.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge